89-723

No.

IN THE
Supreme Court of the United States
OCTOBER TERM 1989

BERNARD GELB,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Were petitioner's Constitutional rights violated by his prosecution and conviction under the Racketeer Influenced and Corrupt Organizations Act ("RICO") where petitioner could not have known that his alleged effort to avoid payment of United States postage constituted a violation of 18 U.S.C. §1962(c) because RICO is so fundamentally vague, uncertain and unpredictable in its scope and application that, as applied to petitioner, the statute violates the Due Process Clause of the Fifth Amendment?

2. Were petitioner's Constitutional rights under the Sixth and Fourteenth Amendments violated as a result of the exclusion from the petit jury, and from the venire from which the petit jury was selected, of individuals of the Jewish faith where (A) petitioner was incontestably a devoutly religious Jew and (B) the District Court, in denying a motion by petitioner to adjourn the trial for a brief period until the conclusion of the Jewish Holidays in late September and early October 1988 in order to obtain a representative cross-section of Jews in the venire, compelled the trial to proceed during the three week period encompassed by the Jewish Holidays of Rosh Hashanah to Simchas Torah because, in the view of the District Court, "I have never felt the Jewish people are a cognizable racial group, different from the majorities of the rest of the whites" in the United States?

3. Was it a legitimate use of the federal mail fraud statute (18 U.S.C. §1341) to criminalize petitioner's underlying offense—the avoidance of payment for United States postage—where (A) as the Court of Appeals itself conceded, there was no precedent in the 120 years of the mail fraud statute's existence penalizing a scheme that did not depend on the content of the mailed materials, (B) petitioner's basic alleged offense was the functional equivalent of stealing United States postage, and (C) other, more narrowly focused statutes exist, but were not charged in the indictment, which would have applied directly to the underlying conduct in which petitioner allegedly engaged?

4. Should this Court, in the exercise of its supervisory powers, review the opinion of the Second Circuit in this case in

order to resolve a conflict among the circuits in their interpretations of the proper scope of the mail fraud statute as defined in *McNally v. United States,* 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed. 2d 292 (1987)?

5. Was it a proper application of the federal bribery statute to convict petitioner of a violation of 18 U.S.C. §201(b)(1)(C) where (A) the alleged "bribery" related exclusively to nominal cash payments, characterized by the recipients themselves as "tips," to members of a single crew of mail-handlers employed by the United States Postal Service, and (B) the mail-handlers were not engaged in any "official function" within the meaning of this Court's decisions in *Krichman v. United States,* 256 U.S. 363 (1921), and *Dixson v. United States,* 465 U.S. 482, 104 S. Ct. 1172, 79 L.Ed. 2d 458 (1984)?

LIST OF PARTIES

The parties in the United States Court of Appeals for the Second Circuit were petitioner Bernard Gelb and respondent United States of America. The parties in the District Court were the United States of America; petitioner; EDP Medical Computer Systems, Inc., which was acquitted by jury verdict; and Barry Garfield, who entered a plea of guilty pursuant to an agreement with the United States and who did not appeal his conviction.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Bernard Gelb ("Gelb") petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

OPINION BELOW

The opinion of the Second Circuit (Appendix A) is reported at 881 F. 2d 1155 (2d Cir. 1989). That opinion affirmed a judgment of conviction entered on January 13, 1989, in the United States District Court for the Eastern District of New York (Hon. Bruce M. Van Sickle, Senior United States District Judge for the District of North Dakota, sitting by designation). The order of the Court of Appeals denying Gelb's Petition for Rehearing is reprinted as Appendix B.

JURISDICTION

The opinion of the Second Circuit was entered on August 1, 1989. The order denying Gelb's timely-filed Petition for Rehearing was dated September 6, 1989 and filed in the office of the Clerk of the Second Circuit on September 8, 1989. The mandate of the Second Circuit affirming the judgment of conviction in accordance with the August 1, 1989 opinion was issued on September 15, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

1. §1962(c) of the Racketeer Influenced and Corrupt Organizations Act ("RICO") provides in full:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

2. §1961(5) of RICO provides:

> (5) "[P]attern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.

3. §1961(1) of RICO provides in relevant part:

> (1) "[R]acketeering activity" means . . . (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery) . . . section 1341 (relating to mail fraud) . . .

4. The federal mail fraud statute (18 U.S.C. §1341) provides in full:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom any such matter or thing, or knowingly causes

to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

5. The federal bribery statute (18 U.S.C. §201(b)(1)(C)) provides in part:

(b) Whoever—

(1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—

. . . (C) to induce such public official . . . to do or omit to do any act in violation of the lawful duty of such official . . . shall be fined not more than three times the monetary equivalent of the thing of value, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust or profit under the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in full:

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the assistance of counsel for his defense.

3. The Fourteenth Amendment provides in relevant part as follows:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. The Basic Nature of the Litigation

Petitioner Gelb—a 46-year-old resident of Queens, New York, the father of two children, and a deeply religious individual with no prior criminal record—has been sentenced to imprisonment for thirteen years and faces overwhelming financial sanctions because of his conviction on racketeering, mail fraud, bribery and tax charges. The conviction was the culmination of a four year investigation which was so massive, so extensive and so disproportionate to the core of Gelb's alleged offense that obvious questions are raised as to the legitimacy, and the constitutionality, of this prosecution and conviction.

Any rational view of this case must begin with one fundamental point: Gelb allegedly avoided paying for United States postage. This is not a case about narcotics, weapons smuggling, political corruption, or acts of violence. This is a case about postage on envelopes.

The fatal flaw of the conviction, as of the Second Circuit

opinion affirming that conviction, was the Government's tactic of converting a case involving unpaid postage and a previously obscure businessman from Queens into a RICO extravaganza. In its lust to exploit the mail fraud and racketeering statutes, the Government framed its indictment and prosecution around the concept that avoidance of payment for postage is a mail fraud under 18 U.S.C. §1341 and that payments of $20 to $40 tips to a crew of mail-handlers are a violation of the federal bribery statute. The Government sought to combine these two predicate violations into an explosive matrix to support a RICO conviction.

The opinion of the Second Circuit not only condoned this improper and, in fact, unconstitutional use of the federal racketeering and mail fraud statutes but also sanctioned a jury selection process that inevitably deprived Gelb of a fair cross-section of people of his religious faith in the venire and of a single person of his faith on the convicting jury.

B. The Superseding Indictment: July 1987

On July 16, 1987, petitioner Gelb, the President of EDP Medical Computer Systems, Inc. ("EDP"), a New York corporation engaged since 1969 primarily in the business of providing data-processing and related services to hospitals, was named as the principal defendant in a multi-count "Superseding Indictment" alleging violations under RICO, the mail fraud statute, the federal bribery statute, and the Internal Revenue Code ("IRC"). The prosecution in the District Court was grounded primarily on the jurisdictional provisions of RICO, 18 U.S.C. §1961 *et seq.* Also named as defendants in the Superseding Indictment were EDP itself and Barry Garfield, a former part-time employee of EDP. The Superseding Indictment followed by two months an original indictment naming only Gelb and alleging violations of the IRC only with respect to five of his personal tax returns and five of EDP's corporate tax returns.

Since the Superseding Indictment has had a determinative impact on the outcome of this case and since it contains the crucial flaws that invalidate the conviction, it should be described at this stage in detail:

(1) *Count One:* Viewed in perspective, the centerpiece of the 78-count indictment was Count One, the only count which alleged violations of RICO. From a structural standpoint, Count One began with a self-described "Introduction" whose avowed purpose was to provide an overview of the alleged "enterprise and its activities." After identifying Gelb as the President of EDP, the introduction described EDP's business as the providing of data-processing, billing and collection services to a wide range of clients, particularly businesses associated with the medical profession. The indictment also alleged that EDP had provided data-processing, billing and collection services for the City of New York, including the City's Parking Violations Bureau, as well as services for Bronx-Lebanon Hospital. EDP was identified, together with its subsidiaries and affiliates, as the RICO "enterprise" within the meaning of RICO §1961(4).

Entitled "The Enterprise's Reliance on the United States Postal Service," the next segment of the indictment's introduction asserted that the business activities of the "enterprise" required the "dispatch of massive amounts of mail" and that the "enterprise" had rented six (6) Pitney-Bowes meters in order to assist those mailings.

After its twelve paragraph introduction, the indictment then attempted to frame the core of Count One itself: Gelb was alleged to have "conduct[ed] and participate[d], directly and indirectly, in the conduct of the affairs of that enterprise through a pattern of racketeering activity" between January 1, 1975 and October 1, 1985. More specifically, the indictment asserted that the pattern of racketeering consisted of (1) Gelb's avoidance of payment for "permit mail," (2) his avoidance of payment for "meter mail," and (3) his "bribery" of a crew of mail-handlers.

Structurally, Count One was divided into 68 alleged racketeering acts. Count One included as the "first act of racketeering" allegations that between January 1, 1975 and January 1, 1979 Gelb had instructed unidentified "employees of the enterprise" to "insert large quantities of the enterprise's first class mail, stamped with a postal permit, in mail sacks delivered to the post office for mailing." According to the indictment, the "permit mail was covered with several layers of

the enterprise's first class mail stamped with a pre-paid postage meter impression." This "burial" scheme, the indictment alleged, "create[d] the appearance that all of the postage had been prepaid when, in fact, much of the postage was unpaid." As far as this "burial" activity was concerned, Count One characterized the "first act of racketeering" as a violation of the federal mail fraud statute, 18 U.S.C. §1341.

The "second act of racketeering" allegedly occurred between January 1, 1979 and October 1, 1985 and related to "meter mail:" Gelb had assertedly devised a scheme to defraud the Postal Service of postage revenue "by tamper[ing] with Pitney-Bowes postage meters to avoid payment of postage for the enterprise's meter mail [and] manipulat[ing] components inside the postage meters in a manner that facilitated the issuance of large amounts of unpaid postage." These "tampering" activities allegedly violated the mail fraud statute.

In a further attempt to create the impression of a series of separate "racketeering acts," Count One continued with a list of "acts of racketeering" consisting of sixty-five (65) instances of payments of cash to unnamed members of a "crew of Postal Service mail handlers at the Flushing Annex Post Office . . ." between January 1983 and December 1984. The 65 "bribes" involved cash payments of approximately $20 to $40 each. Each of the separately numbered payments was alleged as a violation of the federal bribery statute.

(2) *Count Two:* Unlike Count One, Count Two was brief. It alleged that between August 1, 1982 and October 1, 1985 Gelb, EDP and Barry Garfield devised a scheme to defraud the Postal Service of postage revenue "by tampering with Pitney-Bowes postage meters . . ." and "bypass[ing] the security features on postage meters . . ." Count Two purported to state a violation of the federal mail fraud statute.

(3) *Counts Three through Sixty-Eight:* In a remarkable exercise in duplicative pleading, the indictment then listed sixty-five (65) separate counts, denominated "Counts Three through Sixty-Eight." The indictment set forth precisely the same list of alleged payments to members of the Postal Service crew between January 1983 and December 1984 which had appeared in Count One. The only difference was that the payments were characterized as separate "counts" as distinct from separate

"acts," the terminology used in Count One. Counts Three through Sixty-Eight were alleged to involve violations by Gelb of the federal bribery statute.[1]

C. The Emergence of the Segregated Jury: August 1988

By July 1988, after a prolonged delay in the start of the trial caused by the Government's unsuccessful efforts to disqualify defendants' counsel, Judge Van Sickle announced that he intended to begin the trial in late August 1988. (Judge Van Sickle, a Senior United States District Judge for the District of North Dakota, was selected in July 1988 to sit by designation after Chief Judge Platt of the Eastern District of New York, to whom the case was originally assigned, decided not to conduct the trial.) When the Government advised Judge Van Sickle that it anticipated that its case would require six to seven weeks—a period which would encompass the solemn Jewish Holidays of Yom Kippur, Rosh Hashanah and others—defendants moved for a brief adjournment of the start of the trial to early October 1988.

In their pre-trial motion, defendants articulated their concern that the jury pool would not contain a balanced, proportionate number of potential jurors of the Jewish faith if the trial started in late August or September 1988. Defendants submitted evidentiary material strongly suggesting that the Eastern District Clerk's Office routinely excused prospective jurors who indicated that they were Jewish and preferred not to serve during the entire holiday season. Defendants argued that the only effective practical means of insuring a reasonably representative jury pool was the simple expedient of deferring the start of the trial to early October 1988, after the last of the significant Jewish Holidays, Shimini Azareth/Simchas Torah, on October 3 and October 4, 1988.

For its part, the Government vehemently opposed the motion for an adjournment, characterizing it as a "shameful use of religion," despite the Government's concession that "postpone-

1. The final ten counts of the indictment—Counts Sixty-Nine through Seventy-Eight—incorporated precisely the same personal and corporate tax charges against Gelb as were stated in the original indictment.

ment of the trial might result in a greater number of Jewish jurors in the pool."

Rather than rule explicitly on the motion, Judge Van Sickle effectively denied it by directing that jury selection begin on September 14, 1988, with testimony to start as soon as the jury was empanelled.

D. Jury Selection: September 1988

As jury selection during the first two trial days on September 14 and 15 demonstrated, Gelb's and EDP's predictions about the composition of the venire proved absolutely accurate: of the actual jurors and alternates who were empanelled on the second day of the trial and who ultimately convicted Gelb, not one was Jewish. As important—and devastating—as the numerical outcome was, the reasons for the absence of Jewish jurors were even more significant and directly attributable to Judge Van Sickle's lack of familiarity with the practices of Judaism and with the large Jewish population in the Eastern District of New York.

At the very outset of the trial on September 14, 1988, Judge Van Sickle acknowledged that he was totally unfamiliar with the dates or names of the Jewish Holidays. In response to the word "Succoth," for example, he asked, "What is that?" and was advised by Gelb himself that Succoth "represents the exit [from] Egypt, the Jewish people left and went to the wilderness. Religious people literally build small houses in their yards and during the day I actually dwell in them."

Soon after being informed—apparently for the first time in his life—as to what the holidays represented, Judge Van Sickle made the stunning observation, in explaining his reasons for not deferring the trial until after the conclusion of the Jewish Holidays:

> I have never felt the Jewish people are a cognizable racial group, different from the majorities of the rest of the whites in the United States.

The District Court's baldly stated view controlled the entire disposition of the jury-related issues. For example, given that view, Judge Van Sickle made absolutely no religion-sensitive inquiries of the more than 45 people who came before him on voir dire as prospective jurors. In addition, Judge Van Sickle's view

led him to foreclose any inquiry into the Eastern District's apparent practice of deferring Jewish individuals who were called for service during the entire period of Jewish Holidays from Yom Kippur to Simchas Torah. Indeed, Judge Van Sickle described his own superficial effort to come to grips with the issue of prospective jurors who might have been excused from service by the Clerk's Office because of their religion. According to Judge Van Sickle, he had engaged in informal discussions with the Chief Clerk who—not surprisingly—gave the judge oral assurances that "they [the Clerk's Office] do not have that problem. That's all I can tell you now."

E. Trial, Verdict and Sentence: September 1988 through January 1989

1. The Trial: Testimony began as soon as the entirely non-Jewish jury was empanelled on September 15, 1988. The more than twenty witnesses called by the Government in its six-week presentation fell principally into three categories. The first consisted of federal law enforcement agents and employees of the Postal Service. The second principal category consisted of former employees of EDP who, under grants of immunity or plea agreements, had decided to testify against Gelb and EDP; this category included Barry Garfield, who had been named as a defendant in the Superseding Indictment and who became a prosecution witness after indictment. A third principal category consisted of two fired mail-handlers who had been arrested for bribe-taking and whose lives had been shattered; these men gave painful testimony that they had accepted nominal cash payments which they believed were tips from people they referred to as "candy-men" (not one of whom they identified as Gelb), that they had done nothing in exchange for those cash payments other than move EDP's mail promptly from loading dock to unloading dock, and that they had been coerced into testifying after the prosecutors arrested them and convinced them that they had accepted "bribes," not tips.

In essence, the cumulative effect of the six weeks of testimony by prosecution witnesses was that Gelb had received from Arthur Sommer ("Sommer") two Pitney-Bowes meters stolen by Sommer from Pitney-Bowes. Sommer, who had been convicted in 1987 of federal offenses totally unrelated to Gelb or EDP and who testified against Gelb and EDP under a plea ar-

rangement with the Government that entailed, among other things, his immediate release from prison, asserted that (A) he had provided these two meters to EDP and Gelb between 1978 and 1981, (B) he had counterfeited at Gelb's request meter impressions duplicating the impressions on some of EDP's six legitimate Pitney-Bowes meters, and (C) he had enabled EDP and Gelb to send unspecified quantities of mail bearing the counterfeit impressions. Neither of these phantom meters was seized during a massive, day-long search and seizure at EDP's business premises on October 1, 1985, because, as Sommer testified, he had taken the meters from the ceiling at EDP in which they were allegedly concealed immediately before the raid and had smashed them into pieces with a hammer as he drove along the Long Island Expressway from Queens to Montauk, tossing pieces of the meters along the highway.

2. The Verdict: The defense rested at the conclusion of the Government's case. The jury was charged on October 19, 1988. It ultimately returned a verdict against Gelb of guilty on the single RICO count, Count One of the Superseding Indictment. It also found petitioner guilty on Count Two, the mail fraud count, and on the majority of the 65 bribery counts. The verdict also determined Gelb guilty on three of the tax counts for signing EDP's corporate tax returns for 1980, 1981 and 1982 (Counts Seventy-Four, Seventy-Five and Seventy-Six). Gelb was acquitted on seven tax counts, including all five of the personal tax evasion counts and two of the corporate false return counts.

EDP was acquitted in full by the jury.

3. The Sentence and Conviction: On January 13, 1989, Judge Van Sickle sentenced Gelb to thirteen years imprisonment and five years of probation following the prison term. In addition, Gelb was fined $101,000 and ordered to pay $5 million in restitution to the Government.

At the conclusion of sentencing on January 13, 1989, Gelb was remanded to custody immediately. He then filed an emergency motion in the Second Circuit for an order releasing him from prison and granting bail pending appeal. Gelb's motion for release was granted in full on January 24, 1989, by a panel of the Second Circuit (Meskill, Pratt and Altimari, C.J.J.). The District Court, on or about September 8, 1989, in response to an application made by Gelb, entered an order per-

mitting Gelb to surrender voluntarily to any institution that the Bureau of Prisons designated. On October 23, 1989, Gelb voluntarily surrendered to the federal prison in Danbury, Connecticut, where he is now incarcerated.

REASONS FOR GRANTING THE WRIT

A. RICO IS SO FUNDAMENTALLY VAGUE IN ITS MEANING, SCOPE AND APPLICATION THAT GELB'S CONVICTION UNDER THAT STATUTE DEPRIVED HIM OF HIS CONSTITUTIONAL RIGHTS

1. The Nature of Petitioner's Underlying Offense

Gelb was convicted, in reality, of the basic act of avoiding payment for United States postage. Viewing the evidence at trial in the light most favorable to the Government, Gelb achieved that objective over at least a seven year period, from 1978 to October 1, 1985, by (A) "burying" permit mail beneath layers of metered mail delivered in mail bags and other containers to the Postal Service and (B) "counterfeiting" postage meter impressions on the face of envelopes used in the business of EDP and its affiliates. Gelb also achieved the objective of avoiding payment for postage by arranging to "bribe" a crew of Postal Service mail-handlers between January 1983 and December 1984. Gelb's effort to avoid payment for postage came to a complete, crashing end on October 1, 1985, when federal agents executed a day-long search and seizure at EDP's premises during which all of EDP's postage meters were confiscated, along with thousands of documents and other objects.

2. The Unconstitutionality of Applying RICO To The Underlying Offense

As petitioner Gelb consistently urged from the day the Superseding Indictment was returned in July 1987, his conduct did *not* violate RICO. Gelb may have violated other, more narrowly tailored federal statutes, such as 18 U.S.C. §501 (proscribing the counterfeiting of United States postage) and 18 U.S.C. §1725 (criminalizing the avoidance of payment for United States postage), but his conduct did not involve activity which could legitimately be punished as a violation of the federal racketeering statute.

Why? Because Gelb could not have known that acts undertaken to avoid paying for United States postage would expose him to liability under RICO. In other words, he could not have understood that he was engaged in a "pattern of racketeering activity" within the meaning of RICO because the statute is so vague in its scope and application that, as applied to Gelb, it utterly lacks those aspects of "clarity and predictability" which four Justices of this Court have recently emphasized are essential to the constitutionality of any criminal statute. *H.J. Inc. v. Northwestern Bell Telephone Co.*, __ U.S. __, 109 S.Ct. 2893, 2909 (1989) (Scalia, J., concurring).

Indeed, this Court's recent decision in *Northwestern Bell* has brought into painfully sharp focus the precise difficulty with which petitioner Gelb has struggled since the return of the Superseding Indictment in July 1987. What does it mean, in the context of this case, to assert that Gelb engaged in "a pattern of racketeering activity?" To this day, nobody knows, except, of course, the Government lawyers responsible for prosecuting this case. They constructed an indictment which created an Alice-in-Wonderland universe in which "counterfeiting" postage meter impressions, "burying" permit mail and paying "bribes" to mail-handlers created a "pattern of racketeering activity" by a person—Bernard Gelb—who had no prior criminal record, was not alleged to have any organized crime connections, and engaged in no acts of violence. Having constructed that indictment, the Government lawyers then managed to persuade a federal jury and District Court, and ultimately the Second Circuit, that this obscure man had engaged in a "pattern of racketeering activity" for which he now faces thirteen years in prison, five years on probation, more than $100,000 in fines and $5 million in restitution.

3. Northwestern Bell*'s Mandate For Constitutional Review of Petitioner's Conviction*

Even the main opinion in *Northwestern Bell* underscores the reasons why RICO, as applied to petitioner, is unconstitutional. The main opinion in *Northwestern Bell* reemphasized that a "pattern" under RICO requires that a plaintiff or prosecutor must demonstrate that predicate racketeering acts are "related" (109 S. Ct. at 2900) "*and* that they amount to or pose

a threat of continued criminal activity" (*id.*; emphasis in original).

It is entirely unclear how Gelb's conduct involved "related" acts—the first prong of the two-prong test for pattern under *Northwestern Bell.* Gelb was alleged to have "buried" permit mail beneath layers of mail bearing meter impressions in the first years (1975 through 1979) of the almost decade-long period at issue. He was then alleged, in the last phase of the relevant period (1979 through October 1, 1985) to have "counterfeited" meter impressions; and he was accused of having paid $20 to $40 in bribes to a crew of mail handlers in 1983 and 1984.

How were these alleged predicate acts "related?" Their relationship is not clear, certainly not clear enough to have the attributes of "clarity and predictability" so essential to a criminal statute. As the main opinion in *Northwestern Bell* stated, the concept of "relatedness" assertedly focuses on the "relationship of the defendant's criminal acts to one another: 'criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.' " (109 S.Ct. at 2901, *quoting* 18 U.S.C. §3575(e).)

Yet this opaque statement does nothing to clarify whether petitioner's acts were so related that the first aspect of the "pattern" requirement, as elaborated in *Northwestern Bell,* was satisfied. As Justice Scalia trenchantly stressed in his concurring opinion, this Court's reference to §3575(e) as a test for relatedness is, candidly speaking, useless, and particularly useless in Gelb's case:

> . . . §3575(e) is utterly uniformative anyway. It hardly closes in on the target to know that "relatedness" refers to acts that are related by "purposes, results, participants, victims, . . . methods of commission, *or* [just in case that is not vague enough] *otherwise.*" Is the fact that victims of both predicate acts were women enough? Or that both acts had the purpose of enriching the defendant? Or that the different coparticipants of the defendant in both acts were his co-employees? I doubt that the lower courts will find

> the Court's instructions much more helpful than telling them to look for a "pattern"—which is what the statute already says. [109 S.Ct. at 2907; emphasis in original].

Moreover, it is impossible fairly to say that Gelb's alleged predicate acts had "continuity"—the second element of the pattern requirement as delineated in *Northwestern Bell*. At a minimum, his acts were brought to a complete halt *before* October 1, 1985, when Sommer allegedly took the phantom meters from EDP and destroyed them. Again, this Court's main opinion in *Northwestern Bell* provides virtually no guidance in divining whether Gelb's conduct entailed the continuity element so vital to a finding that he engaged in a "pattern." As Justice Scalia summarized:

> The Court finds "continuity" more difficult [than "relatedness"] to define precisely. "Continuity," it says, "is both a closed-and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." *Ante,* at 2902. *I have no idea what this concept of a "closed period of repeated conduct" means. [Id.* at 2907; emphasis added.]

If four Justices of this Court, writing as recently as June of this year, have no idea what this central concept of continuity means, then how could Gelb have known, as he was engaging in the acts which the jury found formed the basis for his guilt, that he was violating RICO and exposing himself to punishment on a grand, punitive scale? Gelb—a high school graduate and a businessman with no legal training or prior criminal record—could not fairly be held to a level of understanding of the RICO consequences of his acts from the mid-1970s through October 1, 1985 that eluded four Justices of this Court in 1989.

4. The Need to Review RICO's Constitutionality In This Case

RICO has been in existence since 1970. It has been a problem statute from the outset. Before *Northwestern Bell,* the lower federal courts had consistently refused to come to grips with the vexing, instinctual question of whether RICO is constitutional at all.

The time to address that nightmare question has come. Joined by three other members of this Court, Justice Scalia said in *Northwestern Bell:*

> That situation [the federal courts' confusion as to RICO's content] is bad enough with respect to any statute, but it is intolerable with respect to RICO. For it is not only true, as Justice Marshall commented in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 105 S.Ct. 3275, 87 L.Ed. 2d 346 (1985), that our interpretation of RICO has "quite simply revolutionize[d] private litigation" and "validate[d] the federalization of broad areas of state common law of frauds," *id.* at 501, 105 S.Ct., at 3292 (dissenting opinion), so that clarity and predictability in RICO's civil applications are particularly important, but it is also true that RICO, since it has criminal applications as well, must, even in its civil applications, possess the degree of certainty required for criminal laws, *FCC v. American Broadcasting Co.*, 347 U.S. 284, 296, 74 S.Ct. 593, 600-601, 98 L.Ed. 2d 699 (1954). *No constitutional challenge to this law has been raised in the present case, and so that issue is not before us. That the highest court in the land has been unable to derive from this statute anything more than today's meager guidance bodes ill for the day when that challenge is presented.* [109 S.Ct. at 2909; emphasis supplied.]

Not only has the time arrived to confront this issue. This is the case in which to do it. Petitioner Gelb, a father of two children with absolutely no prior criminal record, has started to serve a 13 year sentence and faces enormous fines and penalties because he allegedly violated a statute which no one could rationally claim put him on fair notice that he was violating it. Real flesh-and-blood lives are involved in this case. It is accurate to say that this 13 year sentence, applied, as it has been, to a 46-year-old man, is tantamount to a life sentence in terms of petitioner's remaining productive life.

At least as significant as these private interests is the public's need to resolve the issue of RICO's constitutionality. As Justice Scalia prophetically noted, this Court's opinion in *Northwestern Bell* has done nothing to guide the lower federal courts and has, in fact, "increas[ed] rather than remov[ed] the vagueness." 109 S.Ct. at 2908. *Compare Flynn v. Merrick,* 881

F. 2d 446 (7th Cir. Aug. 7, 1989) (a post-*Northwestern Bell* decision) (affirming dismissal of RICO complaint); *Sutherland v. O'Malley,* 882 F.2d 1196, 1204 (7th Cir. Aug. 14, 1989) (affirming dismissal of RICO complaint); *Management Computer Services, Inc. v. Hawkins, Ash, Baptie & Co.,* 883 F.2d 48 (7th Cir. Aug. 23, 1989) (affirming dismissal of RICO complaint) *with United States v. Kaplan,* __ F.2d__, No. 87-1137 (2d Cir. Oct. 3, 1989) (affirming RICO conviction); *Dah Chong Hong, Ltd., v. Silk Greenhouse, Inc.,* 719 F. Supp. 1072 (M.D. Fla. 1989) (upholding sufficiency of a RICO complaint); *Perez-Rubio v. Wyckoff,* 718 F. Supp. 217, 241 (S.D.N.Y. 1989) (concluding that complaint "allegations clearly meet the requirements of relationship and continuity to constitute 'a pattern of racketeering activity' ").

At this stage, there is no legitimate public purpose to be gained by waiting to face this "beast in the jungle"—the issue of RICO's constitutionality—or by addressing this fundamental issue in the context of another case. The time is *now* and the case is *this.*[2]

B. GELB'S SIXTH AMENDMENT RIGHTS WERE VIOLATED AS A RESULT OF THE ABSENCE OF A REPRESENTATIVE CROSS-SECTION OF JEWS IN THE VENIRE AND THE ABSENCE OF A SINGLE JEW ON THE PETIT JURY

1. The Facts Relevant To The Jury Issue

Census statistics paint a vivid portrait of the principal New York counties from which jurors are selected for service in the Eastern District. Of the 2.2 million persons who lived in Kings County at the time of the most recent census, almost 413,000 were Jewish; of the 1.8 million people in Queens County, more than 317,000 were Jewish; and of the 1.3 million in Nassau County, approximately 308,000 were Jewish. Expressed as percentages, 19% of the population in Kings County was

2. Gelb repeatedly challenged the application of RICO to him both in pre-trial motions to dismiss the indictment and on his appeal to the Court of Apepals. The Second Circuit, in its decision, elected to avoid coming to terms with Gelb's claim that RICO could not be applied to him and his conduct.

Jewish; 17% of the population in Queens County was Jewish; and 23% of the population of Nassau County was Jewish.[3]

Not a single Jewish person was on the jury which convicted Gelb. Moreover, of the approximately 45 people whose names were disclosed during jury selection, it was impossible to determine how many, if any, were Jewish because of Judge Van Sickle's determination to disregard this problem. Virtually none of the surnames identified in the transcript for potential jurors carried any suggestion that any of the individuals was Jewish.

2. The Violation of Gelb's Constitutional Rights in The Composition of The Jury

This glaring lack of proportion between the pool of jurors and the proportion of Jewish residents in the principal counties encompassed by the Eastern District unquestionably deprived Gelb of the rights to which he was entitled under the Sixth and Fourteenth Amendments. This deprivation was caused by a trial judge who had absolutely no sensitivity to the clear problems raised by defendants on their motion for a brief adjournment, a motion which, if granted, would have obviated the inevitable infringement of Gelb's rights. The deprivation was directly caused by the bluntly stated conclusion of Judge Van Sickle that Jews "were [not] a cognizable racial group."

Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed. 2d 69 (1986), provides only the starting point for evaluating the jury selection issue in this case. Under *Batson's* now familiar formulation, a defendant initially bears the burden of demonstrating that the circumstances surrounding selection of the jury "raise an inference" that the prosecution exercised peremptory challenges to remove, "on account of their race," members of a "cognizable racial group" to which the defendant himself belongs. 106 S.Ct. at 1723. In the event such a prima

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3. The statistics, which the Government never refuted, are drawn from the *American Jewish Yearbook 1984* prepared and published by the American Jewish Committee at page 140. The Bureau of the Census in its *Statistical Abstract of the United States 1982-83: National Data Book and Guide to Sources* (103rd Edition) bases its summary of religious population on the *American Jewish Yearbook (see Statistical Abstract* at 55).

facie showing is made, the burden shifts to the prosecution to come forward and defend the disputed challenges with "neutral" explanations "related to the particular case to be tried." *Id.*

The present case involves even more invidious problems than those *Batson* attempted to remedy. The sensitive balancing approach delineated in *Batson* was never even reached here because Judge Van Sickle abruptly foreclosed any possibility of obtaining a balanced jury pool when he asserted, as a threshold matter, that Jews did not constitute a "cognizable racial group." Given that startling threshold determination, Judge Van Sickle forced the trial forward during a period when Jews would not be present in the jury pool in representative numbers and effectively precluded the empanelling of a jury drawn fairly from the community.

Not only was Judge Van Sickle's view startling; it was also wrong. In *Shaare Tefila Congregation v. Cobb*, __ U.S. __, 107 S.Ct. 2019, 2022, 95 L.Ed. 2d 594 (1987), the Supreme Court expressly held that Jewish people constitute a cognizable racial group for purposes of 42 U.S.C. §1982. There is no principled basis for treating Jews as members of a "cognizable racial group" for purposes of federal civil rights laws—the subject with which this Court was directly concerned in *Shaare Tefila* and the companion decision of *Saint Francis College v. Al-Khazraii*, __ U.S. __, 107 S.Ct. 2022, 2028, 95 L.Ed. 2d 582 (1987)—but not for purposes of a criminal defendant's Sixth and Fourteenth Amendment right to a properly balanced jury and selection process. *See also Roman v. Abrams*, 822 F.2d 214, 226 (2d Cir. 1987) (re-affirming the analysis of *McCray v. Abrams*, 750 F.2d 1113, 1131 (2d Cir. 1984), *vacated and remanded*, __ U.S. __, 106 S.Ct. 3289, 92 L.Ed.2d 705 (1986), that the Sixth Amendment "guarantees . . . the *possibility* of a petit jury reflecting a cross section of the community") (em-

phasis in original); *United States v. Biaggi*, 673 F.Supp. 96, 102 (E.D.N.Y. 1987).

The course of this case in the District Court involved violations of Gelb's Sixth and Fourteenth Amendment rights which were even more rudimentary than those at issue in *Batson, McCray* and *Roman*. Judge Van Sickle's refusal to adjourn the trial to a period after the close of the Jewish Holidays eliminated any realistic possibility that a sufficiently representative number of Jewish jurors would be in the pool; and the Government, by vigorously opposing the brief requested adjournment, secured an even more sweeping exclusion of Jews from the jury than the prosecutors could have obtained by the extensive use of peremptory and cause challenges.

3. The Need for Review of the Jury Selection Issue In This Case

The Second Circuit's decision (Appendix A) refused to address the Constitutional dimensions of the exclusion of Jews from the jury which convicted Gelb. Instead, the Second Circuit sidestepped the problem and incorrectly read the record in order to conclude that Gelb had failed to preserve his right to a balanced venire and petit jury. As the panel decision stated:

> The [trial] court conducted the voir dire of the venire persons and defense counsel was permitted only to propose to the court voir dire questions. During voir dire, the court did not inquire into the religious beliefs of the prospective jurors, nor did Gelb's attorney request any such inquiry. *Later, during trial,* the court observed: "I have never felt the Jewish people are a cognizable racial group, different from the majorities of the rest of the whites in the United States. [Appendix A at 9a; emphasis supplied].

In fact, the District Court's statement about Jews was not uttered "later, during trial," as the Second Circuit concluded in asserting that Gelb had, in effect, waived and failed to preserve his Constitutional rights; instead, *Judge Van Sickle's finding was made before jury selection even began* and, as a pragmatic matter, put an end to all religion-based inquiry. It is difficult to envision how Gelb could have done more than he did to focus

the District Court's attention on the jury issue, since he made and vigorously advocated the pre-trial motion for a brief adjournment; and it is difficult to accept the concept that Gelb's Constitutional right to a fairly representative jury pool and petit jury should be deemed lost because Gelb's trial attorney, after having focused Judge Van Sickle's attention on the jury selection issue, did not take the additional steps of pushing for religion-related voir dire questions after Judge Van Sickle so categorically ruled that Jews were not "a cognizable racial group."

The Second Circuit's error as to the timing and significance of the District Court's view as to the status of "Jewish people" has had fatal consequences for Gelb's argument that his Constitutional rights were violated when he was tried and convicted by a jury which did not contain a single Jew. The panel, despite its concession that Gelb satisfied the first of the three prongs of the *Duren* test (*Duren v. Missouri,* 439 U.S. 357 [1979]), faulted his showing on the second prong, concluding that he had failed "to demonstrate adequately that Jews were underrepresented in his venire [because] [s]tereotypical ethnic or religious characterizations of surnames are unreliable and only tenuous indicia of a jury's makeup." [Appendix A at 13a].

What this harsh position overlooks is the fact that the District Court had effectively closed down any investigation of the venire members' religious affiliations, based on the District Judge's emphatically stated view that Jews were not "a cognizable racial group." This was no off-hand comment delivered "later, during trial," as the panel decision incorrectly stated: it was Judge Van Sickle's emphatic disposition of Gelb's pre-trial motion for an adjournment because of the clearly emerging problem of the potential absence of Jewish jurors. Given Judge Van Sickle's definitive closing of the door on this issue, it is a cruel, unfair and poorly-grounded result to conclude, as the Second Circuit did, that Gelb failed to demonstrate under-representation of Jews in the venire and the petit jury and consequently failed the second prong of the *Duren* test.

One final point underscores the need for granting a writ of certiorari to review the Constitutional issues raised by the fact that no Jews were on the jury which tried and convicted Gelb. The need for an appropriately balanced petit jury is the central

issue now under review in this Court in a pending appeal entitled *Holland v. Illinois, cert. granted,* 109 S.Ct. 1309 (1989), Supreme Court Dkt. No. 88-5050. Squarely before this Court in *Holland* is whether the Sixth Amendment requires that the petit jury include a representative cross-section of the community—an issue explicitly left open for review in the Supreme Court's February 22, 1989 decision in *Teague v. Lane,* __ U.S. __, 109 S.Ct. 1060, 1065 (1989) ("The principal question presented in this case is whether the Sixth Amendment's fair cross section requirement should now be extended to the petit jury . . . [W]e leave the resolution of that question for another day"). (Oral argument in *Holland v. Illinois* was conducted in this Court on October 11, 1989. 58 U.S.L.W. 3042).

The same question dominates the present case, in the context of a federal prosecution as compared to the state prosecution at issue in *Holland.* Gelb respectfully submits that the absence of people of his faith from the convicting jury and the pool—particularly in light of his uncontroverted showing that Jews range between 19% and 23% of the population of the principal counties from which the Eastern District draws its jurors—requires review by this Court.

C. GELB'S CONVICTION UNDER THE FEDERAL MAIL FRAUD STATUTE WAS INCONSISTENT WITH THIS COURT'S DECISION IN *McNALLY v. UNITED STATES*

1. The Nature of Gelb's Conduct and The Terms of The Mail Fraud Statute

The core offense alleged against Gelb was that he used the United States mail without paying for postage. At the inception of this case, the Government conceived of this conduct as mail fraud under §1341 and adhered to that theory as a means of indicting Gelb under RICO, with §1341 as a predicate offense, in order, as the prosecution itself candidly disclosed at trial, to pursue "enhanced forfeitures" against him.

Simply stated, it is the essence of Gelb's position that, if he had stolen trucks containing stamps in order to mail EDP envelopes without paying for postage, he would *not* have been accused of mail fraud under §1341. This is for the simple reason that §1341, as interpreted in *McNally v. United States,* 483 U.S.

350, 107 S.Ct. 2875, 97 L.Ed. 2d 292 (1987), does not criminalize the underlying offense of avoiding payment of postage.

At the outset, it is important to emphasize the actual language of §1341:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or things, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

2. The Second Circuit's Incorrect Broadening of the Scope of the Mail Fraud Statute

The Second Circuit in this case for the first time in the 120 years of the mail fraud statute's existence criminalized a scheme that depended on the falsification of stamps and impressions on the faces of envelopes, rather than on the substance of what the envelopes contained. The Second Circuit was frank in conceding the total lack of precedent: "[W]e have not found a case in which the mail fraud statute was held to apply to a scheme that involved fraud that did not depend on the content of the posted materials used in that scheme . . ." [Appendix A at 14a.] Despite the conceded lack of precedent, the Court of Appeals held: "[W]e have no hesitation in saying that Gelb's plan to defraud the Postal Service falls within the purview of the mail fraud statute." (*Id.*)

Viewed in perspective, the Second Circuit's admittedly unprecedented interpretation is fundamentally inconsistent with this Court's decision in *McNally*. In that 1987 decision, this Court concluded that §1341's application "is limited in scope," 107 S.Ct. at 2881, and that "Congress' intent in passing the mail fraud statute was to prevent the use of the mails in furtherance of such schemes." 107 S.Ct. at 2881. The "such schemes" to which *McNally* referred were "false promises and misrepresentations" calculated to deprive a person "of something of value by trick, deceit, chicane or overreaching." *Id.* Significantly, §1341 was enacted in 1872 in order, as its legislative history discloses, "to prevent the frauds which are mostly gotten up in the large cities . . . by thieves, forgers, and rapscallions generally, for the purpose of deceiving and fleecing the innocent people in the country." Cong. Globe, 41st Cong., 3d Sess. 34 (1870), *quoted in McNally,* 107 S.Ct. at 2879.

In sustaining the use of §1341 on the facts of this case, the Second Circuit disregarded *McNally's* mandate that the statute be limited in its scope and application. As a matter of fact, the Second Cicuit's application of the mail fraud statute represented a willing and deliberate extension of §1341 so plainly at variance with the Supreme Court's instructions in *McNally* that petitioner's mail fraud conviction merits review on this basis alone.

3. The Second Circuit's Disregard of the Rule of Lenity

Another significant issue meriting review is also raised by the mail fraud conviction. *McNally,* in restricting the scope of §1341, also emphasized the importance of the rule of lenity. And the Second Circuit, in this case, elected to ignore any meaningful application of that rule.

In selecting §1341 as the weapon for prosecuting Gelb for counterfeiting meter impressions, the Government deliberately by-passed 18 U.S.C. §501, which imposes criminal sanctions on "whoever forges or counterfeits any postage stamp, postage meter stamp, or any stamp printed upon any stamped envelope . . ." Similarly, with respect to the alleged "burial scheme" for permit mail, the Government ignored the use of 18 U.S.C. §1725, which criminalizes "deposit[ing] any mailable matter

. . . on which no postage has been paid . . . with intent to avoid payment of lawful postage . . ."

These two statutes were written for the offenses in which Gelb allegedly engaged. The fact that Congress criminalized precisely the conduct in which Gelb was alleged to have been involved made no impression on the prosecutors or, for that matter, the Second Circuit. "That Gelb alternatively could have been charged under other criminal statutes," the Court of Appeals dismissively wrote (Appendix A at 15a-16a), "does not render prosecution under the mail fraud statute improper. The rule of lenity . . . mandates no different result."

Principles of simple fairness have long recognized that a criminal charge should rest on explicit statutes specifically directed at the challenged conduct. Under the rule of lenity, Gelb should have been charged with violations of §§501 and 1725. Accordingly, even if the provisions of the mail fraud statute are construed to extend to Gelb's payment avoidance effort, the conviction for mail fraud should still be voided because of the prosecution's failure to utilize the specific statutes applicable to Gelb's conduct. As another panel of the Second Circuit itself recently stressed in *United States v. Evans,* 844 F. 2d 36, 42 (2d Cir. 1988): "In this criminal case our evaluation . . . is governed by the rule of lenity, which the Supreme Court recently directed we consider when interpreting the statutes in issue here [*i.e.,* the mail and wire fraud statutes]." And, in *McNally* itself, this Court explained that "when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher one only when Congress has spoken in clear and definite language . . . 'There are no constructive offenses; and before one can be punished, it must be shown that his case is plainly within the statute.' " 107 S.Ct. at 2881 (citations omitted).

D. THIS COURT, IN THE EXERCISE OF ITS SUPERVISORY POWERS, SHOULD REVIEW THIS CASE IN ORDER TO RESOLVE CONFLICTS AMONG THE CIRCUITS IN THE APPLICATION OF THE MAIL FRAUD STATUTE

As the course of this litigation in the District Court and the Second Circuit reveals, *McNally* has not had its intended impact

of limiting the scope of the mail fraud statute to those cases in which it was designed to apply. In this litigation, of course, the Court of Appeals did not hesitate to concede that it had "not found a case in which the mail fraud statute was held to apply to a scheme that did not depend on the content of the posted material used in the scheme." (Appendix A at 14a). Having made that concession, however, the Second Circuit thrust itself directly into a new, unchartered area for the mail fraud statute's application, asserting, without any analysis, that "we have no hesitation in saying that Gelb's plan to defraud the Postal Service falls within the purview of the mail fraud statute." (*Id.*)

Any survey of the post-*McNally* treatment of the scope of §1341 makes it clear that the lower federal courts are in conflict, and hopelessly so. The Second Circuit's position in this litigation, for example, stands in striking contrast to the Sixth Circuit's recent decision in *Callanan v. United States,* 881 F. 2d 229 (6th Cir. July 26, 1989). Describing *McNally* as "blockbusting," "a total surprise," and "wholly unexpected" (881 F.2d at 231, *quoting United States v. Ochs,* 842 F. 2d 515, 521 (1st Cir. 1988)), the Sixth Circuit in *Callanan* vacated a mail fraud conviction of a former Michigan state judge who had allegedly violated §1341 by taking bribes ranging from $100 to $6,000 to "fix" several cases pending in the former judge's court. 881 F.2d at 230.

Another recurring split among the Courts of Appeals relates to the instructions which juries must receive in connection with a mail fraud indictment. In Gelb's case, the District Court, over petitioner's objection, instructed the jury that it did *not* have to find that Gelb "actually realized any gain from the scheme" or that the Postal Service "actually suffered any loss [since the] ultimate success of the scheme is not an element of the crime the Government must prove."

In a ruling flatly inconsistent with the express holdings of the Fourth, Fifth, Seventh and Tenth Circuits, the Second Circuit in this case rejected Gelb's contention that the instruction was incorrect. The Second Circuit held that "[t]he challenged instruction is a correct statement of the law; pecuniary injury to the victim is not required. *United States v. King,* 860 F.2d 54, 55 (2d Cir. 1988) (per curiam), *cert. denied,* __ U.S. __, 109 S. Ct. 2062, 104 L. Ed. 2d 628 (1989)." (Appendix A at 15a).

On this same vital issue, the Seventh Circuit has held that "[a] mail fraud conviction may not stand if the 'jury was not required to find that the scheme resulted in the government being deprived of money or property.' " *Magnuson v. United States,* 861 F.2d 166, 168 (7th Cir. 1988), *quoting United States v. Gimbel,* 830 F.2d 621, 627 (7th Cir. 1987). *See also United States v. Mandel,* 862 F.2d 1067, 1072 (4th Cir. 1988); *United States v. Herron,* 825 F.2d 50, 58 (5th Cir. 1989); *United States v. Shelton,* 848 F.2d 1485 (10th Cir. 1988).

In the final analysis, the appeal in this case would present an ideal, timely vehicle for this Court to harmonize the treatment among the Circuits of the scope of the mail fraud statute in general and the nature of jury instructions and elements of proof needed in a mail fraud prosecution.

E. GELB'S BRIBERY CONVICTION SHOULD BE REVIEWED BECAUSE THE CONVICTION CONFLICTS WITH THIS COURT'S 1921 HOLDING IN *KRICHMAN* AND ITS 1984 HOLDING IN *DIXSON*

The federal bribery statute, 18 U.S.C. §201(b)(1)(C), imposes criminal penalties on "whoever . . . corruptly gives . . . anything of value to any public official . . . with intent . . . to induce such public official . . . to do or omit to do any act in violation of the lawful duty of such official or person . . ."

In sustaining Gelb's conviction under §201(b)(1)(C), the Second Circuit concluded that the mail-handlers whom Gelb was alleged to have bribed were "public officials" within the meaning of the statute because "[t]hey were responsible for ensuring that bulk-paid mail of private mailers had proper documentation reflecting payment and, if it did not, that it be further processed and its postage verified. Thus, the postal employees held 'position[s] of public trust with official federal responsibilities.' *Dixson v. United States,* 465 U.S. 482, 496 (1984)." [Appendix A at 16a.]

This conclusion simply misreads the record and, in any event, misapplies controlling precedent of this Court in *Dixson, supra,* and in *Krichman v. United States,* 256 U.S. 363 (1921). Contrary to the Second Circuit's conclusion, no "documentation" whatsoever was required for any of the mail delivered by EDP to the Postal Service during the period of time when the

"bribes" were allegedly paid to the mail-handlers (January 1983 through December 1984). As Postal Service supervisors themselves testified at trial, metered first class mail required no documents of any kind to be presented to the Postal Service or any mail-handlers, since "metered mail" was presumptively pre-paid. According to a Senior Marketing Specialist with the Postal Service, a mailer such as EDP using undiscounted first class mail was not required to deliver or provide "paperwork" of any type to Postal Service mail-handlers when delivering mail to the post office. During that critical 1983-1984 period of alleged bribery, EDP mailed only undiscounted first class metered mail.

In reality, then, the mail-handlers whom Gelb was alleged to have bribed had no responsibility "for ensuring that bulk-paid mail of private mailers had proper documentation," as the Second Circuit stated (Appendix A at 16a), and the record makes it clear that the mail-handlers had only one function: to unload EDP's first class metered mail delivered to the first class platform and then to load that mail onto outgoing trucks, not to analyze documents.

Review by this Court of the bribery aspect of the conviction is important for several reasons. First, neither the Second Circuit nor the Government was able to point to a single precedent to support the claim that cash payments to mail-handlers rise to the level of bribery of federal officials. This absence of precedent is not surprising, since the obvious logical extension of the Government's—and of the Second Circuit's—position is that the common custom of giving Christmas gifts to postmen could entail criminal liability for bribe-giving under §201.

Second, this case, together with another case recently decided by the Second Circuit, *United States v. Romano*, 879 F.2d 1056 (2d Cir. July 12, 1989), involves an unwarranted expansion of the scope of the federal bribery statute. In both *Romano* and *Gelb*, two panels of the Second Circuit have, for the first time, interpreted the concept of "public official" under federal bribery law to extend to all employees of the United States, without regard to their function or duties.

The difficulty with this expansion is that *Romano* and *Gelb* conflict with long-settled, undisturbed precedent. In *Krichman v. United States, supra*, this Court held that a baggage porter employed by the United States was not a public official under

the predecessor to the current bribery statute and that, in handling baggage, he was not performing the kind of "official function" which the bribery statute is designed to protect. 256 U.S. at 365. "The act aims to punish the attempted bribery or bribery of officials and those exercising official functions under or by the authority of a department or office of the Government. Not every person performing any service for the Government, however humble, is embraced within the terms of the statute. It includes those, not officers, who are performing duties of an official character." *Id.* at 366.

The vitality of the 1921 decision in *Krichman* was reaffirmed by the 1984 decision in *Dixson v. United States, supra.* "To determine whether any particular individual falls within this category [public official], the proper inquiry is . . . whether the person occupies a position of public trust with official federal responsibilities. Persons who hold such responsibilities are public officials within the meaning of §201 . . ." 465 U.S. at 496.

In *Romano,* the Second Circuit, stressing that "this circuit has not been squarely faced with this precise question before" (879 F. 2d at 1059), held that an individual's mere "status as an employee [of the federal government] is sufficient to make him a 'public official' under the statute." (*Id.*) And, in *Gelb,* the Second Circuit extended the concept of "public official" under the bribery statute to include mail-handlers.

Since both *Romano* and *Gelb* are at variance with controlling Supreme Court precedent in *Krichman* and *Dixson*—and since the panel decisions represent an unwarranted, novel expansion of the federal bribery statute—the decision in this case should be reviewed.

CONCLUSION

For all the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Dated: New York, New York
November 3, 1989

Respectfully submitted,

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APPENDIX A—SLIP OPINION OF THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1229—August Term, 1988

(Argued May 30, 1989 Decided August 1, 1989)

Docket No. 89-1038

UNITED STATES OF AMERICA,

Appellee,

—against—

BERNARD GELB,

Defendant-Appellant.

Before:

LUMBARD, NEWMAN and MINER,

Circuit Judges.

Appeal from judgment entered in the United States District Court for the Eastern District of New York (Van Sickle, J.) convicting defendant-appellant after jury trial of violation of Racketeer Influenced and Corrupt Organizations Act, and of mail fraud, bribery and making false corporate tax returns.

Affirmed.

PAUL A. BATISTA, New York, NY, *for Defendant-Appellant.*

GORDON E. MEHLER, Assistant United States Attorney, New York, N.Y. (Andrew J. Maloney, United States Attorney for the Eastern District of New York, M. Lawrence Noyer, Jr., Assistant United States Attorney, New York, NY, of counsel), *for Appellee.*

MINER, *Circuit Judge*:

Defendant-appellant Bernard Gelb appeals from a judgment of conviction entered after a jury trial in the United States District Court for the Eastern District of New York (Van Sickle, J.).* Having engaged in schemes to avoid paying postage on mass mailings, Gelb was found guilty of one count of violating the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c) (1982); one count of mail fraud, 18 U.S.C. § 1341 (1982); fifty counts of bribery, 18 U.S.C. § 201(b)(1)(C) (1982 & Supp. V 1987); and three counts of willfully making and subscribing false corporate income tax returns, 26 U.S.C. § 7206(1) (1982).

Gelb claims, *inter alia*, that by conducting a trial during the Jewish holiday season, which, he asserts, made it impossible to include Jews in the venire from which his jury was selected, the district court deprived him of his sixth and fourteenth amendment rights to a jury represent-

* The Hon. Bruce Van Sickle of the United States District Court for the District of North Dakota, sitting by designation.

ative of his community. He argues also that his mail fraud conviction was improper because dispatching mail without paying postage does not constitute mail fraud. Furthermore, he claims that paying Postal Service employees to ensure proper service is not bribery, and that there was insufficient evidence to support his bribery conviction in any event. Because the predicate offenses of mail fraud and bribery are said to be insupportable, Gelb argues that the RICO conviction cannot stand. Gelb contends also that evidence about "payoffs" to an institution other than the Postal Service, inadvertently introduced by a government witness, had a prejudicial effect upon the jury. Finally, Gelb claims that the district court committed reversible error during voir dire by not asking the jury venirepersons if they understood that testimony of a law enforcement official is not entitled to enhanced credibility simply by virtue of the official position of the witness.

It appears from the record that Jewish jurors are excused from duty only on Jewish holidays, not during the whole holiday season. As Gelb's trial was suspended for only the days necessary to observe the Jewish holidays, Gelb's sixth and fourteenth amendment rights were not harmed by the jury selection process. Contrary to Gelb's understanding of mail fraud, we hold that defrauding the Postal Service of postage does constitute mail fraud. Since the evidence supports Gelb's conviction for bribery as well as mail fraud, his conviction for violating RICO was proper. The "payoff" evidence inadvertently introduced by the government to which Gelb takes exception was not prejudicial. Finally, any error the district court may have committed during voir dire was harmless. Accordingly, we affirm.

BACKGROUND

EDP Medical Computer Systems, Inc. ("EDP") is a mass mailing and bill collection agency in Queens, New York that Bernard Gelb founded in 1969 and has managed ever since. While Gelb habitually held himself out to the public as EDP's sole shareholder, he actually held no shares in EDP, which had twenty-four shareholders, including Gelb's wife. In its own name and those of its affiliates and subsidiaries, EDP engaged in magazine subscription solicitations, collections for a number of New York City agencies, and data processing and billing for the Bronx-Lebanon Hospital. A common feature of EDP's activities was the dispatch of large amounts of mail; EDP's mail volume varied between 100,000 and 1,000,000 pieces per mailing. By all accounts, Gelb's business was successful. As a matter of fact, Gelb boasted that EDP had been the most successful of the collection agencies used by the New York City Environmental Control Board in 1985.

Generally, EDP used two types of first-class postage for its mailings—permit mail and metered mail. With permit mail, the mailer is assigned a permit number, which is placed on envelopes by the mailer using either a preprinted envelope or a rubber stamp. When a stack of permit mail is brought to the post office, a sample piece is weighed, as is the entire stack. The weight of the stack is divided by the weight of the sample piece. This yields the number of pieces in the stack and the appropriate charge is then levied on the mailer. Thus, permit mail is paid for at the time of mailing.

With metered mail, the mailer rents postage meters from the post office. A postage meter contains two inter-

nal registers, one ascending, which shows the total amount of postage imprinted by the meter since it first was put into circulation, and the other descending, which shows the amount of postage available on the meter at the moment of observation. Whenever the meter stamps out postage, the machine adds the amount of that postage to the ascending register and deducts it from the descending register. When the descending register runs down, the mailer brings the meter to the post office and purchases postage, the amount of which is added to the descending register and recorded on Postal Service Form 3610. Thus, metered mail is prepaid. Needless to say, access to the internal mechanisms of a meter, which is possible only by breaking a lead wire seal, is available only to authorized Postal Service employees. Most postage meters are manufactured by the Pitney-Bowes Corporation.

Gelb defrauded the Postal Service in two ways. From 1975 to 1978 he avoided the payment of postage by burying in sacks or hampers brought to the post office large quantities of permit mail beneath a few layers of metered mail. By such packing, Gelb created the impression that the entire sack or hamper already had been paid for, when, in fact, most of it had not.

Sometime in 1978 Gelb devised another scheme to avoid paying postage. After Gelb urged him to find "a way to save postage," EDP employee Arthur Sommer delivered to Gelb a stolen Pitney-Bowes postage meter. At Gelb's behest, Sommer broke the meter's seal and gained access to the inner mechanisms of the machine. He filed off the meter's unique serial number, which is engraved on a metal strip and is impressed onto a meter stamp anytime postage is dispensed from the machine, and glued onto it a metal strip fraudulently engraved with the serial number

of one of Gelb's legally obtained meters. As a result, Gelb had in his possession a meter whose existence was not known to either the Pitney-Bowes Corporation or the Postal Service, and that produced meter stamps that appeared to have been printed by a legitimate machine. Gelb was able to manipulate at will the stolen machine's descending register. Thus, he had available unlimited amounts of postage for which he would not have to pay. Gelb used this stolen machine for nearly seven years.

Sommer stole a second Pitney-Bowes meter at Gelb's command and, as he did with the first machine, replaced its engraved serial number with a metal strip upon which was engraved the serial number of one of the meters legally registered to EDP. All told, Gelb had two stolen meters available to him, each of which could stamp out an impression identical to one created by a legal meter.

Between 1978 and 1985 EDP purchased only small amounts of postage for its six legal meters. Because the Postal Service requires that meter postage be bought or meters be inspected no less than once every six months and makes unannounced meter inspections, EDP ran enough mail through its legal machines to create the impression that these machines were used in accordance with Postal Service regulations. However, EDP used the two stolen meters to stamp postage for the bulk of its metered mail, often "a million [pieces] at a time."

EDP claimed as tax deductions postage stamped from the illicit meters. The discrepancy between the postage purchases recorded on Postal Service Forms 3610 and the amount claimed as business deductions on EDP's tax returns generally exceeded $145,000 a year. For example, in tax year 1980, Forms 3610 show that EDP purchased $70,020 in meter postage, but Gelb signed an EDP tax

return listing deductions for postage in the sum of $265,906.

Testimony at trial revealed that Gelb, through associates, paid postal employees to ensure that his permit mail scheme went undetected. Two postal service employees who worked on the receiving platform of the Flushing Annex Post Office, Thomas Geraghty and John Krikorian, testified that they had received money from an EDP mailer named "Bernie," to whom Geraghty referred as the "Candy Man." Bernie told Krikorian at their first meeting that when EDP mail sacks were brought to the Flushing Annex Post Office, even without proper documentation, "[y]ou don't have to do nothing, just transfer it on to the trucks," and gave him $100 dollars. Bulk mail unaccompanied by documentation must be processed and the postage verified before being loaded onto delivery trucks. As a result of Bernie's instructions, whenever EDP's mail was brought to the Flushing Annex Post Office, Krikorian and Geraghty did not notify a supervisor or pass the mail on for further processing. Krikorian eventually lost his job for accepting money from Bernie.

Sometimes the money was paid by EDP truck drivers or assistants who had been seen with Bernie by post office employees. The money usually was delivered in an envelope addressed in Gelb's handwriting to a "Richard King," and always was packaged between two computer punch cards. Generally, money was received by the post office employees either once a week or once or twice a month, but never less than once a month. The money used for the bribes came from checks cashed by two EDP employees, James Papa and Sherman Simanowitz.

In July 1987, a grand jury returned a seventy-eight count superseding indictment charging Gelb with one

count of violating RICO, one count of mail fraud, sixty-six counts of bribery and ten counts of personal and corporate tax violations. Count one charged that EDP and its affiliates and subsidiaries constituted an "enterprise" under 18 U.S.C. § 1961(4) and alleged that Gelb had conducted through EDP a pattern of racketeering involving two acts of mail fraud (i.e. both schemes to avoid paying postage) and sixty-six acts of bribery. Counts two through seventy-eight charged separate mail fraud, bribery and tax violations. EDP itself was charged with one count of mail fraud.

The trial of Gelb and EDP was scheduled to commence August 22, 1988 and last for six to seven weeks. On August 9, Gelb moved to delay the trial until the week of October 11 or, in the alternative, to have the trial suspended on various dates so that he, as an orthodox Jew, could observe the Jewish holidays that generally occur in the early autumn. Gelb argued that permitting the trial to proceed as scheduled would deprive him of his sixth and fourteenth amendments rights to a jury composed of his peers, which he asserted must include Jews. Gelb expected that Jews would obtain postponement of their jury duties until after the Jewish holiday season. In support of his motion, Gelb submitted an affidavit of his wife in which she averred that she had spoken with someone at the Clerk's Office of the United States District Court for the Eastern District of New York, who told her that Jews called to serve jury duty in September and October 1988 "would be routinely excused from jury duty during the period simply by writing to the Jury Administrator." The government responded with an affirmation by the United States Attorney for the Eastern District of New York stating that, according to Aileen O'Hare, a Jury Clerk of the Eastern District court, Jews were not excused for the

entire holiday period, but only for the specific dates of the holidays. The court declined to adjourn the trial, but agreed to suspend the trial on all days necessary to permit Gelb to observe the Jewish holidays.

On August 17, Gelb unexpectedly underwent elective surgery to remove a stone from his gall bladder. He requested a twelve week postponement of his trial so that he could recuperate. The court granted him a postponement of about one month. Trial eventually commenced on September 14, 1988.

The court conducted the voir dire of the venirepersons and defense counsel was permitted only to propose to the court voir dire questions. During voir dire, the court did not inquire into the religious beliefs of the prospective jurors, nor did Gelb's attorney request any such inquiry. Later, during trial, the court observed: "I have never felt the Jewish people are a cognizable racial group, different from the majorities of the rest of the whites in the United States."

Anticipating that the prosecution would base at least part of its case on government witnesses, the defense suggested the following voir dire question: "Do you understand that just because a witness happens to be a police officer or law enforcement agent, that such individual's testimony is entitled to no greater weight than the testimony of any other witness, nor are such individuals entitled to any greater credence simply because of their position?" The court declined to pose that or any similar question to the potential jurors.

Proposing to prove Gelb's intent, the government moved *in limine* to admit similar act evidence that Gelb had bribed an employee of the Bronx-Lebanon Hospital

with cash packaged in the same manner as the charged bribes of the postal employees. The district court ruled that the evidence could be used by the government only in rebuttal, not in the government's case-in-chief. However, in its case-in-chief, the prosecution asked its witness Sherman Simanowitz: "Did Mr. Gelb ever tell you why he needed this cash?" Simanowitz responded: "He used it to a large extent to pay various employees, including myself, a portion of our salaries in cash. And also it was necessary to pay off some people at the post office and at the hospital."

Gelb immediately moved for a mistrial. The court expressed the view that this was "a serious breach . . . [and] an unwarranted slander of the defendant." An *in camera* examination of Simanowitz revealed that he had been cautioned by the government to avoid mentioning the hospital payoffs. Simanowitz explained: "I hesitated when I had to, the question was asked, the last series of things I mentioned, in fact I was waiting for an objection or someone to stop me. Nobody did. It was responsive to the question, in fact." The court denied the motion for a mistrial, instructed the jury to disregard the testimony, and precluded the government from offering the evidence again, even in rebuttal.

Following a jury verdict, a judgment was entered convicting Gelb of the RICO count, the mail fraud count, fifty bribery counts and three of the tax counts. EDP was acquitted of the single mail fraud count with which it was charged. The court sentenced Gelb to imprisonment for thirteen years, to be followed by a five-year term of probation, and ordered him to pay $5 million dollars in restitution and $101,000 in fines.

Gelb appeals his conviction, proffering various arguments. He argues that the court's refusal to adjourn his case until after the Jewish holiday season led to an unrepresentative jury. He asserts that mail fraud cannot possibly include a scheme to defraud if the content of the mailed matter is irrelevant to the success of the scheme. Gelb seeks also to upset his bribery conviction; he contends that the bribery statute does not cover his cash payments to the postal service employees and that the evidence adduced was insufficient to support his conviction on the bribery counts. Since, according to the theory of Gelb's appeal, mail fraud was not committed and bribery was not properly established, Gelb argues that the RICO conviction should fail for lack of predicate offenses. Gelb asks also that his conviction be reversed because the testimony about the payments at Bronx-Lebanon Hospital was introduced improperly by the government. As well, he contests the district court's failure to inquire of the prospective jurors during voir dire whether they understood that testimony by a law enforcement officer is not entitled to credence greater than testimony by anyone else simply by virtue of the officer's position.

DISCUSSION

1. *The Jury*

The sixth amendment right to a trial by jury unquestionably includes the right to a petit jury drawn from a pool that is a representative cross-section of the community. *Taylor v. Louisiana*, 419 U.S. 522, 537-38 (1975); *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 220 (1946). While the equal protection clause of the fourteenth amendment prohibits underrepresentation of minorities in juries by reason of intentional discrimination, *Alston v. Manson*, 791 F.2d

255, 257 (2d Cir. 1986), *cert. denied*, 479 U.S. 1084 (1987), "[t]he sixth amendment is stricter because it forbids any substantial underrepresentation of minorities, regardless of . . . motive," *id.* at 258.

Gelb claims that by not postponing his trial until after the Jewish holiday season, the court deprived him of a pool of potential jurors representative of his community, thus violating his sixth and fourteenth amendment rights. Gelb relies on *Batson v. Kentucky*, 476 U.S. 79, 96-97 (1986), which teaches that in proving an equal protection claim the defendant bears the initial burden of demonstrating that the prosecution improperly exercised peremptory challenges to remove members of a cognizable racial group from the jury. However, *Batson*, which involved a claim of invidious discriminatory intent, concerned racially biased prosecutorial conduct that excluded a cognizable racial group from the jury; allegations of such conduct are absent from this case.

Pertinent to Gelb's claim is *Duren v. Missouri*, 439 U.S. 357, 364 (1979), which established the requirements that must be met for a defendant to make out a prima facie showing of a violation of the sixth amendment's fair cross-section protection. Under *Duren*, Gelb must show:

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Id.

Jews are a cognizable group for purposes of 42 U.S.C. § 1982. *See Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617-18 (1987). There is no reason to distinguish between section 1982 and the constitutional claim made by Gelb in this case. Accordingly, as the government concedes, Gelb meets the first prong of the *Duren* test.

As to the second prong, Gelb cites census statistics to show that numerically Jews are a significant portion of the population in three of the five counties in the Eastern District of New York. He then infers underrepresentation of Jews in his jury pool from his observation that "[v]irtually none of the [potential jurors'] surnames . . . carried any suggestion of being Jewish." He also claims that Jews could not have been on his venire because they would have been excused from jury duty during the days when his trial was conducted.

Gelb fails to demonstrate adequately that Jews were underrepresented in his venire. Stereotypical ethnic or religious characterizations of surnames are unreliable and only tenuous indicia of a jury's makeup. *See United States v. Bucci*, 839 F.2d 825, 834 (1st Cir.), *cert. denied*, 109 S. Ct. 117 (1988); *United States v. Sgro*, 816 F.2d 30, 33 (1st Cir. 1987), *cert. denied*, 108 S. Ct. 1021 (1988). Absent a showing of a correlation between being Jewish and having a Jewish-sounding surname, underrepresentation cannot be presumed. *See Bucci*, 839 F.2d at 834. As well, the credible evidence shows that Jews can absent themselves from the jury selection process only on the specific dates of the holidays in question, not during the entire holiday season. Gelb's trial recessed during the days necessary for him to observe the holidays; any Jewish juror who wanted to observe the holidays would not have had to disqualify himself from this trial. Accordingly, Gelb's sixth amend-

ment claim must fail for lack of a showing that Jews were underrepresented in his venire. For the same reason, his fourteenth amendment claim also must fail. *See Castaneda v. Partida*, 430 U.S. 482, 494-95 (1977). Because we hold that Gelb has not satisfied the second prong of the *Duren* test, we need not address whether Jews were systematically excluded in the jury selection process.

2. *Mail Fraud*

Gelb argues that the mail fraud statute, 18 U.S.C. § 1341, encompasses only fraudulent schemes dependent on the content of mailed materials and does not criminalize avoidance of the payment of postage. He contends also that the mail fraud statute implicates only schemes that involve "false promises and misrepresentations," *McNally v. United States*, 483 U.S. 350, 359 (1987). Section 1341 criminalizes the use of the U.S. mails for, *inter alia*, executing "any scheme or artifice to defraud." While we have not found a case in which the mail fraud statute was held to apply to a scheme that involved fraud that did not depend on the content of the posted materials used in that scheme, we have no hesitation in saying that Gelb's plan to defraud the Postal Service falls within the purview of the mail fraud statute. Here, the mails were used in a scheme or artifice that involved misrepresentations and was meant to defraud the U.S. Postal Service of revenue. In *United States v. Starr*, 816 F.2d 94 (2d Cir. 1987), the facts underlying an alleged mail fraud were nearly identical to the mail-burying scheme employed by Gelb. There, we reversed the conviction for mail fraud, which was based on charges of cheating customers of a mailing service who had received the services for which they had paid, but we indicated that had the government "charge[d] specifically a scheme to defraud the postal service," mail

fraud would have been established. *Id.* at 97 n.4; *see id.* at 102 (Newman, J., concurring).

Gelb suggests that stealing postage is similar to the deprivation of intangible rights described in *McNally* and so cannot constitute mail fraud. Gelb, however, is not charged with implementing a scheme to defraud anyone "of their intangible rights," *McNally*, 483 U.S. at 355; *see* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603(a), 102 Stat. 4181, 4508 (1988) (post-*McNally* amendment of 18 U.S.C. § 1346 to include within definition of "scheme or artifice to defraud" a plot to deprive someone of intangible right to honest services), but with depriving the Postal Service of postage, which has demonstrable value and in which the Postal Service has a property right. The defect in the mail fraud conviction challenged in *McNally* was that "there was no charge and the jury was not required to find that the Commonwealth [of Kentucky] itself was defrauded of any money or property." *McNally*, 483 U.S. at 360. Here, the superseding indictment charged that Gelb defrauded the Postal Service.

Gelb takes issue with the court's instruction to the jury that "[i]t is not necessary that . . . the United States Postal Service[ ] actually suffered any loss. The ultimate success of the scheme is not an element of the crime . . . ." He contends that it is an essential element of the crime that the defrauded party be deprived of money. The challenged instruction is a correct statement of the law; pecuniary injury to the victim of the fraud is not required. *United States v. King*, 860 F.2d 54, 55 (2d Cir. 1988) (per curiam), *cert. denied*, 109 S. Ct. 2062 (1989).

That Gelb alternatively could have been charged under other criminal statutes, namely 18 U.S.C. § 1725 (1982),

which criminalizes "deposit[ing] any mailable matter . . . on which no postage has been paid . . . with intent to avoid payment of lawful postage," and 18 U.S.C. § 501 (1982), which criminalizes "forg[ing] or counterfeit[ing] any . . . postage meter stamp, or any stamp printed upon . . . any die, plate, or engraving," does not render prosecution under the mail fraud statute improper. The rule of lenity, *see McNally*, 483 U.S. at 359-60; *United States v. Evans*, 844 F.2d 36, 42 (2d Cir. 1988), mandates no different result.

3. *Bribery*

The bribery statute, 18 U.S.C. § 201, applies to any person who "corruptly gives . . . anything of value to any public official . . . with intent . . . to induce such public official . . . to do or omit to do any act in violation of the lawful duty of such official." *Id.* § 201(b)(1)(C). Gelb suggests that a postal employee is not a "public official." The statute defines a public official to include "an employee or person acting for or on behalf of the United States . . . in any official function, under or by authority of any . . . department, agency, or branch of Government." *Id.* § 201(a)(1). We have no doubt that the postal employees whom Gelb bribed were "acting for the United States in an official function," *Krichman v. United States*, 256 U.S. 363, 365 (1921). They were responsible for ensuring that bulk-paid mail of private mailers had proper documentation reflecting payment and, if it did not, that it be further processed and its postage verified. Thus, the postal employees held "position[s] of public trust with official federal responsibilities," *Dixson v. United States*, 465 U.S. 482, 496 (1984).

As well, and despite Gelb's contention, the evidence was sufficient to sustain the convictions. John Krikorian and

Thomas Geraghty, two of the arrested postal employees, testified that although at first they considered the money they received as tips, they eventually became suspicious because "the money started to get bigger," and EDP was the only mass mailer to deposit sacks of mail without proper documentation. The return address on an envelope containing bribe money and turned over by Krikorian to the government was that of an EDP subsidiary, and the defense stipulated that the envelope bore Gelb's handwriting. Certainly, "after reviewing the evidence in the light most favorable to the prosecution, [a] rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

4. *RICO*

The RICO conviction is well-grounded. Because we have determined that conviction on the mail fraud and bribery counts are proper, there are many acts of racketeering, i.e. all the instances of meter tampering, mailing and bribing. *See, e.g., Beauford v. Helmsley*, 865 F.2d 1386, 1392 (2d Cir.) (in banc) ("each act of fraudulent mailing is separately indictable"), *vacated and remanded*, 109 S. Ct. 2983 (1989). Together these acts constitute the required pattern. "[T]o prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity." *H.J. Inc. v. Northwestern Bell Telephone Co.*, 57 U.S.L.W. 4951, 4953 (U.S. June 26, 1989). The relatedness element is present; with each of his schemes Gelb sought to cheat the Postal Service by not paying the appropriate postage. *See United States v. Indelicato*, 865 F.2d 1370, 1381-84 (2d Cir. 1989) (in banc). The requirement of continuity is sat-

isfied; the schemes were conducted for about five years, and but for their discovery surely would have continued. *See H.J.*, 57 U.S.L.W. at 4954.

Gelb argues also that the prosecution did not distinguish between the defendant, Gelb, and the enterprise, EDP. He complains that the prosecution averred in a letter to the court that "Gelb *is* EDP," and at trial stated that "Gelb was, in fact, EDP." In a section 1962(c) prosecution, the named RICO defendant and the alleged enterprise cannot be the same; they must be separate entities. *Bennett v. United States Trust Co. of New York*, 770 F.2d 308, 315 (2d Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986). However, here the superseding indictment identified Gelb as the defendant and "EDP and its subsidiaries and affiliates" as the enterprise. "[T]he indictment plainly alleged as a RICO enterprise a business entity that was distinct from [Gelb]." *United States v. Weinberg*, 852 F.2d 681, 684 (2d Cir. 1988). In fact, the district court instructed the jury that to convict Gelb on the RICO charge, it had to find that EDP was an enterprise. As to the government's two assertions of the unity of identity between Gelb and EDP, they were simply to show that severance of EDP's trial from Gelb's trial was inappropriate and that the government should be allowed to introduce against EDP evidence that was used against Gelb.

5. *Simanowitz' Testimony*

Gelb contends that the district court should have declared a mistrial once Simanowitz testified during the government's case-in-chief about money Gelb had paid to employees of the Bronx-Lebanon Hospital. Normally, similar act evidence that is offered for purposes of intent "should await the conclusion of the defendant's case

. . . . This enables the trial judge to determine whether the issue sought to be proved by the evidence is really in dispute . . . ." *United States v. Colon*, No. 88-1253, slip op. at 4551 (2d Cir. July 14, 1989) (quoting *United States v. Figueroa*, 618 F.2d 934, 939 (2d Cir. 1980)). However, because the court originally had ruled that the evidence could be introduced in the government's rebuttal, Gelb actually benefitted from the judge's ultimate refusal to let the evidence in at all. Furthermore, the one reference to the Bronx-Lebanon Hospital "payoffs" was cured by a limiting instruction. Any error suggested by the Simanowitz testimony can only be depicted as harmless.

6. *Voir Dire*

A district court has "very broad discretion as to how much, and what, is to be asked of prospective jurors." *United States v. Anagnos*, 853 F.2d 1, 5 (1st Cir. 1988). The court in *Anagnos* adopted the standard developed in *United States v. Baldwin*, 607 F.2d 1295 (9th Cir. 1979). In *Baldwin*, the court observed:

> All circuits appear to be in agreement that the refusal to ask the question of whether the prospective jurors would be unduly influenced by the testimony of a law enforcement officer does not always constitute reversible error; that question hinges upon such factors as the importance of the government agent's testimony to the case as a whole; the extent to which the question concerning the venireperson's attitude toward government agents is covered in other questions on voir dire and on the charge to the jury; the extent to which the credibility of the government agent-witness is put into issue; and the extent to which the testimony

of the government agent is corroborated by non-agent witnesses.

Id. at 1298.

In *Anagnos*, upon which Gelb relies, the First Circuit treated as reversible error the trial judge's refusal to ask prospective jurors a question similar to the one requested by the defense here, because the agent in charge of Anagnos' investigation was the government's first witness, his testimony occupied 100 pages of transcript and he sat at counsel's table throughout the trial. *Anagnos*, 853 F.2d at 4. However, applying the *Baldwin* standard to the facts of this case demonstrates that if the district court committed an error by not questioning jurors about the influence of official testimony, it was harmless. Each of the several Postal Service inspectors and the one Internal Revenue Service agent who were witnesses in this case gave brief testimony. The district court properly charged the jury in regard to assessing the credibility of law enforcement witnesses. As well, the credibility of most of the official witnesses was not subject to extensive challenge. Finally, the incriminating testimony that detailed Gelb's criminal activities was given by Gelb's accomplices, not law enforcement officials.

7. *Remaining Contentions*

We have considered Gelb's remaining contentions and find them to be meritless.

CONCLUSION

The judgment of the district court is affirmed.

APPENDIX B—ORDER DATED SEPTEMBER 8, 1989 DENYING MOTION FOR REHEARING

United States Court of Appeals
for the
Second Circuit

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 6th day of September, one thousand nine hundred and Eighty-nine

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UNITED STATES OF AMERICA,
Appellee,

v.

BERNARD GELB,
Defendant-Appellant.

DOCKET NUMBER 89-1038

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by defendant-appellant, Bernard Gelb

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the

appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk
by Kathleen Brown
Deputy Clerk